



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 110 OF 2009

BETWEEN

ATTORNEY GENERAL.....APPELLANT

AND

SMALL WONDER LTD.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Justice Kihara Kariuki) delivered on 3rd February 2009 in H.C.C.C. NO. 918 OF 2002)

JUDGMENT OF THE COURT

This is an appeal by the **Attorney General**, who was the defendant in the High Court, against the judgment and decree of the High Court **P. Kihara Kariuki, J.** (as he then was) delivered on 3rd February, 2009. The judgment was pursuant to formal proof as the defence which had been filed by the Attorney General was struck out by **Mwilu, J.** (as she then was) on 17th April, 2008 for being frivolous and vexatious. No appeal was preferred against that finding.

The dispute arose in the following way. **Small Wonder Limited** (“the respondent”) sued the Attorney General on behalf of the Commissioner of Lands, Ministry of Lands and Settlement for declarations that its rights to plot **Number 644** comprised in Grant **Number C R 20175**, comprising about 8.677 hectares (“the suit property”) had been infringed and that the suit property had unconstitutionally been taken away by the said Commissioner. The respondent also prayed for general, special, exemplary and aggravated damages, interest and costs.

The respondent claimed that it was the registered owner of the suit property but had unlawfully and arbitrarily been barred from developing the same by the District Land Registrar, Malindi on the ground that the suit land had been allocated to other parties which event had deprived it of the use and enjoyment of the same by reason of which it had suffered special loss and damage which was particularized. The respondent also claimed the aforesaid several categories of damages.

When the matter was listed for formal proof on 12th November, 2008 it was placed before **P. Kihara Kariuki J.** The record shows that learned counsel, **Mr. Mwangi**, appeared for the respondent but there was no appearance for the Attorney General. Mr. Mwangi, informed the court that the respondent had been served by the Attorney General. The court thereupon took the testimony of one **Piela Renato**. At the

conclusion of his testimony Mr. Mwangi orally applied and was allowed to amend paragraph 10(d) of the plaint by substituting Kshs.271,354/= with Kshs.655,593/=

The testimony of one **Magdalene Wambui Muhia**, a valuer, was also taken in part. The hearing was then adjourned to 20th November, 2008 at 11.00 am and an order was made that the appellant be served.

On 20th November, 2008 Mr. Mwangi again appeared for the respondent but the appellant was absent. Mr. Mwangi informed the court that the appellant had been served and an affidavit of service filed whereupon the court took the second and final part of the valuer's evidence. Mr. Mwangi made brief submissions and once more orally applied to and was allowed to amend paragraph 10(e) of the plaint to include valuation fees of Kshs.801,470/=

In a reserved judgment delivered as aforesaid, the learned Judge granted the declarations sought in the plaint together with general damages of Kshs.301,875,000/=, special damages of Kshs.1,457,063/=, interest and costs. Finally, the learned Judge ordered that upon payment of the decretal amount, the Commissioner of Lands cancels the registration of the respondent as the proprietor of the suit property.

The appellant was aggrieved and therefore lodged the appeal before us citing nine grounds. At the hearing of the appeal however, **Mr. Kamau**, learned counsel who appeared for the Attorney General, relying on written submissions filed with the leave of the Court, condensed all the grounds into the following three grounds:-

- “1) **THAT the learned Judge erred both in fact and in law to allow the proceedings to continue ex-parte despite non-service on the part of the appellant;**
2. **THAT the learned Judge erred both in fact and in law to award special and general damages contrary to trite factual particularization and trite principle of the law on award of the same; and**
3. **THAT the learned Judge misapplied the law in allowing the respondent to amend its plaint without notice to the appellant and after all evidence had been tendered.”**

On the issue of service, Mr. Kamau submitted that the learned Judge did not satisfy himself that the appellant had indeed been served with hearing notices before taking the evidence of the respondent on the two occasions when the case came up for formal proof. Learned counsel maintained that the appellant was never served as alleged or at all.

On the question of special damages, Mr. Kamau submitted that the sum pleaded was not the sum awarded which award violated the settled principle that special damages have not only specifically to be pleaded, they have also to be strictly proved. On the issue of general damages, learned counsel submitted that the sum awarded did not reflect what the respondent had lost as the suit property had been allocated to him and was not privately purchased or developed by him.

With regard to the amendments allowed by the learned Judge, Mr. Kamau submitted that the same were ordered too late in the proceedings and without notice to the appellant. According to learned counsel, that was improper. In the premises, learned counsel urged us to allow the appeal and order a rehearing of the case.

Mr. Mwangi, appeared for the respondent as he did before the High court. He submitted that the appellant had indeed been served when formal proof proceeded. On general damages, learned counsel submitted that the Commissioner of Lands had promised alternative land to the respondent without success and the award made by the learned Judge was consequently appropriate.

In learned counsel's view there would be no benefit to send the matter for retrial. He therefore urged for dismissal of the appeal with costs.

This is a first appeal. A first appeal to this Court is by way of a retrial. The Court has power to re-examine and re-evaluate the evidence when it becomes necessary. Further, this Court is not bound to follow the lower court

Judge's findings of fact if it appears, *inter alia*, that he failed to take into account particular circumstances or probabilities or took into account factors or circumstances which he should not have. (See **Selle -v- Associated Motor Boat Co. [1968] EA 123** and **Mwanasokoni -v- Kenya Bus Services Ltd. [1985] KLR 931**).

On the question of service on the appellant, his counsel made a specific complaint in grounds 7 and 8 of the grounds of appeal that the appellant was not served with a hearing notice when the case proceeded ex-parte on formal proof. We are unable to form an opinion as to whether the appellant was indeed served with a hearing notice for 12th November, 2008 when the suit first came up for formal proof because the relevant return of service was not made part of the record of appeal and is not traceable in the registry file.

Although Mr. Mwangi maintained that service of a hearing notice had been effected upon the appellant, he did not find it necessary to file a supplementary record of appeal to incorporate the return of service despite the express complaint made by the appellant in that regard. The principles applicable to the setting aside of default judgments are settled. If the judgment is a regular one the court's discretion is to be exercised in order to do justice between the parties: **Patel -v- EA Cargo Handling Services Ltd. [1974] EA 75**. In weighing the interests of justice the court has to consider, among other things, the reasons, if any why the particular default was committed, the conduct of the parties and in particular such conduct as has a bearing on the course of justice in the case: **Shah -v- Mbogo [1967] EA 116** and **Pithon Waweru Maina -v- Thuku Mugira [1988] KAR 171**; Whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgment, and of course it should always be borne in mind that to deny a party a hearing should be the very last resort of a court of justice: **Sebei District Administration -V- Gasyali**

[1968] EA 300. Where there is no proper or any service of a hearing notice, the resulting proceedings including the default judgment are irregular and the court must set them aside *ex debito justitiae* (as a matter of right) on application by the affected party. Such proceedings and judgment are not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself.

If the appellant had moved the High Court to set aside the ex parte proceedings and judgment he would have invoked the then **Order IXB rule 8** (now Order 12 rule 7) of the **Civil Procedure Rules**. The rule provides:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

In considering an application under this rule the provisions of the then **rule 3(a) (b) (now rule 2(a) and (b))** of the same Order would have been pertinent. The same read as follows:

“3. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied

a. that notice of hearing was duly served, it may proceed ex-parte;

b. that notice of hearing was not duly served, it shall direct a second notice to be served;”

In view of our finding with regard to service of a hearing notice herein, the High Court would have, under the above provisions, directed another notice to be served when the case come up for formal proof or would have set aside any judgment entered ex – parte, on the appellant's application.

The appellant opted to directly appeal against the ex parte proceedings and judgment and, as an appeal to this Court is by way of a retrial, we are entitled, as we have done herein above, to re-evaluate and re-analyse the material which was placed before the High Court and reach our own independent conclusion.

Having come to the conclusion that the respondent did not demonstrate that the appellant was served with a hearing notice when the case came up for formal proof, we do not find it necessary to consider the other complaints made by the appellant. We allow this appeal and order that the proceedings before P. Kihara Kariuki J. and the subsequent judgment dated 3rd February, 2009 and all consequential orders be and are hereby set aside.

We further order that the High Court suit be reheard on formal proof.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR